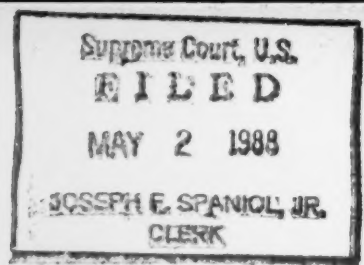


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No. 87-1200



In The
Supreme Court of the United States
October Term, 1987

BOARD OF TRUSTEES OF
ALABAMA STATE UNIVERSITY, *et al.*,
v. *Petitioners,*
AUBURN UNIVERSITY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL RESPONSE OF
AUBURN UNIVERSITY
IN OPPOSITION TO CERTIORARI

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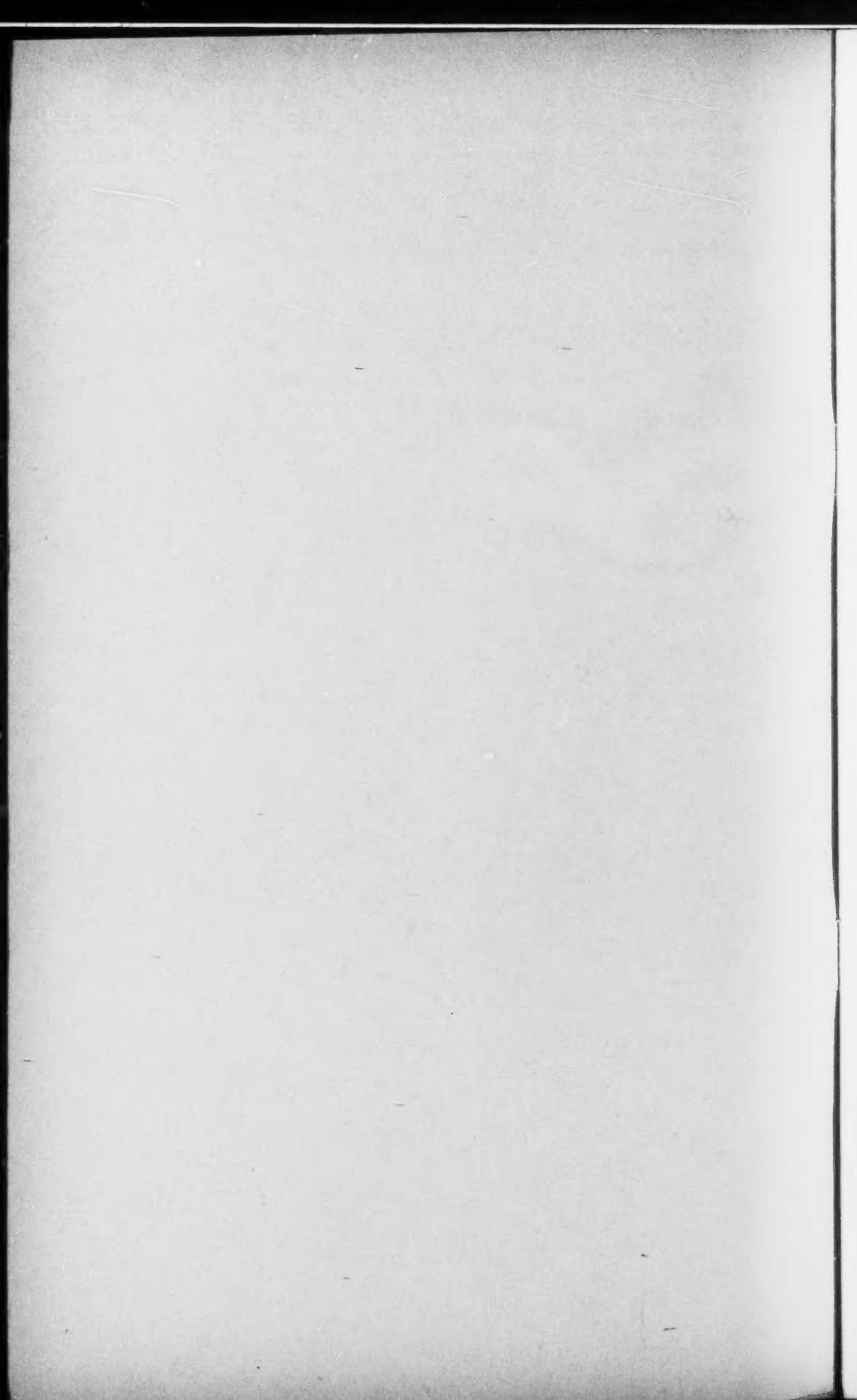


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INTRODUCTION

Petitioners' Reply Brief in support of certiorari does not address new arguments made for the first time in the briefs in opposition but, rather, revisits issues raised in the Petition. The Reply Brief does not, therefore, comply with Supreme Court Rules 22.5 or 21.3. It should be considered an untimely addendum to the Petition and stricken. If the addendum to the Petition is accepted, Auburn University requests that it be permitted to respond as it would have if such arguments had properly been included in the Petition. In connection with this brief, Auburn University has submitted to the Clerk Volume 1 of the attachments to its principal brief in the Court of Appeals, which consists of exhibits offered at trial and other matters of record in the trial court.

1. The Court of Appeals' Findings Relative To The Trial Judge's Sponsorship Of The Alabama A&M University Capital Funds Bill Are Supported By The Record.

Defendants' Exhibit AU5928A (at p. 16-23 of the attachments to the Brief of Appellant Auburn University in the Court of Appeals) is Alabama A&M University's proposal for the capital funding bill which became S387, lodged by Petitioners with the Clerk of this Court. Exhibit AU5928A contains a statement of justification and rationale for the proposed allocation of funds and includes a draft bill. The draft bill provides in its synopsis that the proposed \$10,000,000.00 appropriation is "for the purpose of providing and improving certain facilities at the University so as to *bring it up to an equal status with other institutions of higher*

learning in the State of Alabama and surrounding areas." The proposed bill and the bill co-sponsored by the trial judge are identical with respect to the total appropriation and the specific uses for the funds. Both provide for a total appropriation of \$10,000,000.00, \$1.5 million of which is to be used for "constructing and equipping a fine arts building," \$400,000.00 to be used for the acquisition and construction of a "central receiving warehouse," \$400,000.00 to be used for the acquisition of "land to be used in research and agriculture," \$900,000.00 for "general campus improvement," \$2.3 million to be used for "additions and improvements to Carter Hall," \$1.5 million for "additions to and improvements of classroom buildings," \$1.5 million for "additions and improvements to the south wing of Carver Complex," \$1.5 million for "additions and improvements of J. F. Drake Library," and that "up to 20% of the funds . . . appropriated for any project" may be shifted to any other project as the need so arises.

The statement of justification and rationale for the bill contained in Exhibit AU5928A cites the following in support of the proposed appropriation:

When funds are in short supply, usually maintenance and renovation needs are neglected in favor of funding academic programs – mostly salaries. . . . A major renovation of existing facilities and the building of additional facilities are essential to carry on the minimum programs at our institution.

. . .

While Alabama A&M University has a beautiful natural setting, many problems exist that hamper progress . . .

- narrow, worn streets without curbs and gutters
- too few streets to accommodate present day traffic
- inadequate parking facilities
- too few sidewalks
- inadequate campus lighting
- too few and inadequate traffic safety devices
- poor campus landscape

Most streets on campus are too narrow and in dire need of general repair, including resurfacing. Few, if any, streets have been resurfaced during the past 20 years. In addition, none of the streets have curbs and gutters.

The trial court found as fact that:

The extent of renovations over the last 30 years at A&M adversely affects its ability to attract white students. Vehicular and pedestrian roadways and sidewalks are in serious need of repair . . . buildings are boarded up. The overhead power lines, bare ground, surface erosion and parking lots interspersed among the buildings detract from A&M's overall appearance. Substantial renovations and new construction are necessary to enhance A&M's attraction as to white students.

The similarity between the trial court's findings and the statement of justification for the bill co-sponsored by the trial judge fully support the Court of Appeals' conclusions that "the stated premise of this bill was that the facilities of A&M were inferior to those of the historically white universities," and that "Judge Clemon was making factual determinations about bills and legislative fights in which he played an active part."

2. The Court of Appeals' Holding With Respect To The Trial Judge's Involvement In The Trustee Confirmation Process Was Supported By The Record.

The Petitioners also misrepresent the basis of the Court of Appeals' finding with respect to the trial judge's participation in the confirmation of the boards of trustees of the various universities. The newspaper clipping in which the trial judge was quoted as having opposed the confirmation of a nominee to the Board of Trustees of predominantly black Alabama State University (ASU) on the ground that he was white was not, as Petitioners allege, "Auburn's sole basis" for recusal. Notwithstanding the fact that the Petitioners never disputed the accuracy of the statements attributed to the trial judge, the trial judge's participation in the nomination process was corroborated by the official record of the Alabama State Senate published in the *Alabama Senate Journal*. The *Senate Journal* was sufficient to support the Court of Appeals' holding that "it is clear that Judge Clemon's activities in the Senate were relevant to and plainly affected the ultimate outcome of the nomination and confirmation process for the board of trustees of the defendant institutions. Yet Judge Clemon explicitly found at trial that the composition of defendants' governing boards was a relevant and important factor in his finding of liability. . . . In his examination of the composition of these governing boards, Judge Clemon was in part examining his own handiwork."

The newspaper clipping about which Petitioners complain, but the accuracy of which they do not dispute, was attached to two depositions in the court below, both of which were filed in the district court and comprise part of the record on appeal. One of these, the deposition of the plaintiffs' expert Steven J. Wright, was offered in lieu of cross-examination after the trial court unduly limited the cross-examination of Dr. Wright. The trial court denied admission of the deposition and both the University of Alabama System and Auburn University asserted that denial as error on appeal. At any rate, there was no necessity for the clipping to be admitted into evidence at trial in order for the Court of Appeals to consider it on the recusal issue. See *Potashnick v. Port City Construction Co.*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980).*

**Potashnick and Price Brothers v. Philadelphia Gear Corp.*, 629 F.2d 444, 447 (6th Cir. 1980) do, despite Petitioners' protestations, support the Court of Appeals' action on recusal in this case. In *Potashnick*, the Court of Appeals remanded to the district court *on the motion of the movant for recusal*, ostensibly because *none* of the matters supporting recusal were in the court file. See 609 F.2d 1106, 1114-15. Moreover, the *Potashnick* court conducted its own review of the record with no deference given to the findings of the district court on the recusal issue. Similarly, in *Price Brothers*, the Court of Appeals remanded "for an evidentiary hearing and report" because the "present state of the record raises many questions that must be answered prior to any further consideration of the other issues raised on this appeal." 629 F.2d at 447. The Court of Appeals, however, "reserve[d] jurisdiction to consider and pass upon the report." Thus, these cases support the Court of Appeals' *de novo* review of the record in this case on the recusal issue.

3. The Facts Relied Upon By The Court of Appeals Are Not In Dispute.

The Petitioners contend that the recusal issue involves disputed facts, without pointing to any facts in dispute. They have in fact not disputed the trial judge's own statements with regard to his involvement in *Lee v. Macon* or that evidence regarding the issue in that case with which he was involved was received in evidence at the trial of this case. They do not dispute that the A&M capital appropriations bill was sponsored by him or that the subject of the bill was an issue at trial. Finally, they do not dispute that the trial judge was Co-Chairman of the Rules Committee in the Alabama State Senate which withheld the confirmation of a nominee for the Chairmanship of the Board of Trustees of Alabama State University whose confirmation would have resulted in a majority white Board of Trustees. These are the facts upon which the Court of Appeals' decision was based.

CONCLUSION

In their Petition and Reply, Petitioners have mischaracterized not only the record in this case but also the decision of the Court of Appeals on this issue. Writ of certiorari should not issue.

Respectfully submitted

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